

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

FRED BURLINGAME,

Petitioner,

v. // CIVIL ACTION NO. 1:16CV181
(Judge Keeley)

WILSON, Warden,

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION [DKT. NO. 26] AND
DENYING AND DISMISSING PETITION WITH PREJUDICE [DKT. NO. 1]

On September 9, 2018, the pro se petitioner, Fred Burlingame ("Burlingame"), filed a Petition for Habeas Corpus Pursuant to 28 U.S.C. § 2241 ("Petition") (Dkt. No. 1). In the Petition, Burlingame challenges his sentencing court's designation of several predicate offenses as "violent felony convictions." Id. at 5. In addition, he claims that the Bureau of Prisons ("BOP") has incorrectly calculated his sentence. Id. at 6. Pursuant to 28 U.S.C. § 636 and the local rules, the Court referred the Petition to the Honorable Robert W. Trumble, United States Magistrate Judge, for initial review.

In a Report and Recommendation ("R&R") entered on February 7, 2018, Magistrate Judge Trumble recommended that the Court deny and dismiss Burlingame's Petition with prejudice (Dkt. No. 26). As an initial matter, the R&R reasoned that Burlingame is not eligible for relief under Johnson v. United States, 135 S. Ct. 2551 (2015), because he was not sentenced under the Armed Career Criminal Act (Dkt. No. 26 at 10). In addition, to the extent that Burlingame

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otherwise seeks to challenge his sentence, he has not established that § 2255 is an inadequate or ineffective remedy pursuant to In re Jones, 226 F.3d 328 (4th Cir. 2000), because the conduct that forms the basis of his conviction is still a criminal offense (Dkt. No. 26 at 11-13).¹ Finally, Magistrate Judge Trumble reasoned that the BOP has appropriately declined to credit Burlingame, or grant him a nunc pro tunc designation, for certain time he spent in state custody prior to his federal case. Id. at 7-9.

The R&R also informed Burlingame of his right to file "written objections identifying the portions of the Report and Recommendation to which objection is made and the basis for such objection." It further warned that the failure to do so may result in waiver of the right to appeal. Id. at 13-14. Although Burlingame received the R&R on March 2, 2018 (Dkt. No. 27), he has filed no objections.

When reviewing a magistrate judge's R&R, the Court must review de novo only the portions to which an objection has been timely made. 28 U.S.C. § 636(b)(1)(C). On the other hand, "the Court may

¹ Although Magistrate Judge Trumble entered the R&R before the Fourth Circuit held that the savings clause may be utilized to challenge certain sentences in United States v. Wheeler, 886 F.3d 415 (4th Cir. 2018), the decision does not change the outcome of this case. Other than Johnson v. United States, Burlingame has not identified a substantive change in the law that entitles him to relief. See id. at 429.

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adopt, without explanation, any of the magistrate judge's recommendations to which the prisoner does not object." Dellacirprete v. Gutierrez, 479 F. Supp. 2d 600, 603-04 (N.D.W. Va. 2007) (citing Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983)). Courts will uphold those portions of a recommendation to which no objection has been made unless they are "clearly erroneous." See Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005).

Because no party has objected, the Court is under no obligation to conduct a de novo review. Dellacirprete, 479 F. Supp. 2d at 603-04. Upon reviewing the R&R and the record for clear error, the Court:

- 1) **ADOPTS** the R&R (Dkt. No. 26);
- 2) **GRANTS** the respondent's Motion to Dismiss or for Summary Judgment (Dkt. No. 19); and
- 3) **DENIES** and **DISMISSES** Burlingame's Petition **WITH PREJUDICE** (Dkt. No. 1).

It is so **ORDERED**.

The Court **DIRECTS** the Clerk to transmit copies of this Order to counsel of record and the pro se petitioner, certified mail and

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return receipt requested, to enter a separate judgment order, and to remove this case from the Court's active docket.

DATED: May 15, 2018.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE